IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 15524 of 2005

For Approval and Signature:
HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAKBOOLHUSEN RAZAKMIYA MANIYAR & 1 - Petitioner(s)
Versus
BANK OF BARODA & 4 - Respondent(s)

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Appearance :
MR AR MAJMUDAR for Petitioner(s) : 1 - 2.MR NK MAJMUDAR for Petitioner(s) : 1 - 2.
MR PRANAV G DESAI for Respondent(s) : 1,
MS PAURAMI SHETH, ASST. GOVERNMENT PLEADER for Respondent(s) : 2,
MR MTM HAKIM for Respondent(s) : 3,
NOTICE SERVED BY DS for Respondent(s) : 4,
None for Respondent(s) : 5,

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI
Date : 23/06/2006

ORAL JUDGMENT

1. The petitioners are before this Court praying that – Para – 18(B) - "*Be pleased to issue appropriate writ, order or direction and be pleased to hold that, considering the provisions of the Securitisation & Reconstruction of Financial Assets &*

Enforcement of Security Interests Act, the petitioners who are borrowers and who had never given the property being Flat No. C/201, Zamzam Apartment, First Floor, Patel Falia, Hathikhana, Fatepura, Baroda, as security to the respondent No.1, the respondent No.1 and 2 have no right or authority to take any action under the provisions of the Act and further be pleased to hold that, the respondent Nos. 1 and 2 have no right or authority to take possession of the Flat of the petitioners under the provisions of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interests Act (emphasis supplied).

Besides, the petitioners have prayed various other reliefs, as Para – 18, the prayer clause, consists of, as many as eight sub-clauses.

2. If the petitioners are heard, saying the submissions made in this petition and if the petition is considered for grant of the relief quoted hereinabove or any other relief, its net effect will

be that the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interests Act; 2002 (hereinafter referred to as “the Act”) will stand repeal from the statute book.

The act was brought on the statute book for a definite purpose and the purpose was to see that the financial institutions are not made to follow a long recovery procedure of the debts, particularly, the secured debts. In the present case, the respondent No.1 - Bank of Baroda advanced some loan to respondent No.3, for which the property in question i.e. Flat bearing No. C/201 of 'Zamzam Apartment' was the security. The say of the petitioners is that they do not know respondent No.3. They have purchased this Flat from one Jetunisha Kadarmiya Shaikh – respondent No.4 herein. It is not difficult to infer that Ruxanabeg Kamalbeg Mirza – respondent No.3 herein had sold this Flat to respondent No.4 and the petitioners purchased that Flat from the respondent No.4. The petitioners purchased this Flat by registered sale-deed, executed

by respondent No.4 and respondent No.5 in favour of the petitioners. The sale-deed was executed in favour of the petitioners by one Sikandarbhai Kadarbhai Shaikh, the Power of Attorney holder of respondent Nos.4 and 5.

3. The strenuous submissions of the learned advocate for the petitioners that they purchased the Flat by registered sale-deed and while doing so, they did get the title documents verified and certified by an advocate as loan was to be taken from Vijaya Bank, they should be held to be a bonafide purchaser of the property and no provision of the Act shall operate against the petitioners.

4. The learned advocate for the petitioners invited attention of this Court to various definitions contained in various Clauses of Section - 2 of the Act, like, Clause – (f) “borrower”, (m) “financial institution”, (o) “non-performing asset”, (zd) “secured creditor” and (ze) “secured debt.” The learned advocate also referred to Section - 13,

which is in Chapter – III of the Act pertaining to 'enforcement of security interest.' Section - 14 pertaining to the assistance to be rendered by the Chief Metropolitan Magistrate or District Magistrate while the secured creditor is taking possession of secured asset. Section – 17 pertaining to right to appeal.

5. The learned advocate for the petitioners submitted that none of these definitions and the provisions have any application to the facts of the case of the petitioners, for the simple reason that, the Bank of Baroda – respondent No.1 herein, never advanced any loan to the petitioners and therefore, there is no question of the petitioners being “borrowers”; there is no question of the property being 'secured asset'; there is no question of Bank of Baroda being 'secured creditor'; and therefore, this petition should be admitted, interim relief, granted earlier, should be continued and not only that considering the facts of the case the reliefs prayed for by the petitioners, should be granted, by

allowing the petition.

6. The learned advocate for the petitioners next submitted that respondent No.1 – Bank has not complied with the provisions of Section – 13, however, he clarified that this submission is made without prejudice to his earlier submissions, namely, the provisions of the Act do not apply to the case of the petitioners, the respondent Bank and the petitioners have no relationship of 'borrower' and the 'secured creditor' and therefore, the petitioners should not be touched by the Bank. The learned advocate submitted that if at all the Court does not accept the submissions made on behalf of the petitioners, then, the submission that, “the respondent Bank has not followed the prescribed procedure” be accepted and if not on the first ground, than, on the second ground, the petition be allowed and reliefs as prayed for be granted.

Sub-section (1) of Section – 13 provides as under :-

> *"Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act."*

The learned advocate submitted that he be allowed to reiterate that these submissions are made without prejudice to his earlier submissions, namely, they are not the 'borrowers' and the respondent Bank is not the 'secured creditor' and therefore, the action of the respondent No.1 – Bank taking recourse to the provisions of this Act is illegal and the same be quashed and set aside by this Court on this sole ground.

7. The learned advocate for the petitioners next relied upon the provisions of Sub-Section (2) of Section – 13, which reads as under :-

> *"Where any borrower, who is under a liberty to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4)."*

The learned advocate reiterated that the Court may bear in mind the fact that the petitioners are not the 'borrowers' qua respondent No.1 and necessary consequences thereof is that respondent No.1 – Bank is not the 'secured creditor' qua the petitioners and therefore, no action under any of the provisions of the Act can be taken by respondent No.1 against the petitioners.

The learned advocate vehemently submitted that

the identity of the property is immaterial, what is material is the relationship of 'borrower' and 'secured creditor' and once that relationship is not there Bank of Baroda respondent No.1 should be restrained from taking any action against the petitioners.

The effect of the acceptance of this submission of the learned advocate will be that the entire exercise undertaken by the Legislature of enacting this Law and putting it on the statute book will vanish. If this is allowed then every person, having borrowed a loan from the Bank or any other financial institution, can get away by transferring the property to some other person, and that person who will be in possession of the property will be arguing like the present petitioners that they are not the 'borrowers' and the financial institution is not the 'secured creditor' and therefore, no action can be taken in the matter and let the petitioners and for that reason all such persons be allowed to live happily. The argument of the learned advocate for the

petitioners is not only unreasonable but against the morality. However, it does not sound unreasonable to the learned advocate for the petitioners because he is under an obligation to be discharged in the open Court by arguing that condition precedent for implementation of law is the relationship of 'borrower' and the 'secured creditor' between the parties. Identification of the property is to be ignored. The submission of the learned advocate for the petitioners is that the petitioners are not 'the borrower', the respondent No.1 – Bank is not 'the secured creditor' and therefore, the Bank cannot take any action against the petitioners and must thank itself and write off the debts.

8. The learned advocate for the petitioners next submitted that, it is also required to be noted that the respondent No.1 – Bank did not give any notice under Sub-section (2) of Section – 13 to the petitioners. The submissions of the learned advocate is that if the secured creditor/respondent No.1 – Bank treats the petitioners to be 'borrowers' then

they should have been served with the notice under Sub-section (2) of Section – 13. He submitted that in fact, notice issued by the secured creditor/respondent No.1 – Bank dated 8th June, 2005, a copy of which is produced at Annexure – E, was never addressed to the present petitioners. The petitioners having come to know of the said notice, gave a detailed reply by communication dated 20th June, 2005. The reply is on this very line. The learned advocate for the petitioners submitted that only because the petitioners replied to the aforesaid notice, it should not be held that the petitioners were served with the notice he submitted that the fact remains that there is non-compliance of Sub-section (2) of Section -13.

9. The learned advocate for the petitioners next referred to Sub-section (4) of Section – 13 and particularly, Clause (d) of Sub-section (4). The Sub-section (4) and Clause-(d) thereof read as under :-

“In case the borrower fails to discharge his

liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely :-

(a) -
(b) -
(c) -

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

The learned advocate for the petitioners submitted that even under Clause (d) of Sub-section (4) of Section – 13, the respondent No.1 – Bank has not called upon the petitioners to pay any money. He submitted that in fact, there is no money due to be paid by the petitioners to the borrower and therefore, the Bank could not have asked the petitioners to pay any amount to the respondent Bank. The learned advocate submitted that in fact, the respondent Bank has not given any notice to the

petitioners and therefore, the action against the petitioners deserves to be quashed and set aside by this Court.

10. The learned advocate for the petitioners relied upon a decision of the Hon'ble the Apex Court in the matter of ***Mardia Chemicals & Ors. V/s. Union of India & Ors.*** reported in **(2004) 4 SCC Page – 311**. The learned advocate pressed Head-Note – C of the judgment in service and submitted that the Hon'ble the Apex Court while considering the provisions of Section – 13 and various Sub-sections has laid down that, 'there is a purpose in providing for a service of a notice upon the borrower' under Sub-section (2) of Section-13 of the Act.' In the present case, the petitioners are not served with any such notice, therefore, it is to be held that provisions of the Act are breached and therefore, the petition be entertained and the reliefs sought for be granted.

11. None of the submissions of the learned advocate are found to be acceptable. If any of the arguments

of the learned advocate are accepted, as discussed hereinabove, the same will have only one effect and i.e. nullifying the entire Act. Besides, the Court finds that all arguments/submissions are thoroughly misconceived. The learned advocate for the petitioners conveniently avoided to acknowledge the concept of 'secured assets' and the secured assets cannot 'disappear' like a natural human being, the borrower. In the present case, the borrowers and the respondent No.3 could dupe somebody by transferring the 'secured assets,' firstly to respondent No.4, who in turn transferred to present petitioners. Even if the bonafides of the petitioners are not doubtful the question is “whether they have a remedy against the secured creditor/respondent No.1 – Bank” or against the persons who duped them by selling the property which was already mortgaged as 'secured assets' with the Bank of Baroda – 'the secured creditor.'

12. Mr. P.G.Desai, learned advocate appearing for respondent No.1 – Bank invited the attention of the

Court to Section – 17 of the Act. He submitted that even on merits, the respondent No.1 has a fairly arguable case which in his assessment is a 'fool proof' case. He submitted that he does not want to detain this Court on a matter which does not warrant investment of so much of time because in the Act itself a right to appeal is provided. He submitted that the Legislature seems to have contemplated such situation and therefore, right to appeal, is not conferred only on “borrower' on one hand and 'secured creditor' on the other”. The learned advocate submitted that the right to appeal is conferred on world at large as Section – 17 opens with word “any person”. The learned advocate submitted that the Legislature being conscious of the fact that such a situation is not only likely to arise, but is likely to arise almost every day it provided that “any person, aggrieved by any of the measures referred to in sub-section (4) of Section – 13 taken by the secured creditor .....” can file an appeal. Right to appeal is conferred on every person, who is aggrieved of the steps taken by the 'secured

creditor.' He submitted that in the present case, assuming for the sake of argument that the petitioners are not served with notice under Sub-section (2) of Section – 13 of the Act before taking steps under Sub-section (4) of Section – 13, the remedy lies in filing an appeal and not a petition before this Court.

The learned advocate for the respondent No.1 – 'secured creditor' submitted that on the face of it, this matter involves questions of disputed facts, like, “whether the respondent No.1 – Bank of Baroda is a 'secured creditor' qua the property in question”. This can be determined by an appropriate Forum, which will examine the question by appreciating the evidences lead before it. Once that is established by the 'secured creditor' – respondent No.1, all other questions will become irrelevant. The fact which is empathetically pressed into service by the petitioners that they purchased this property by taking loan from Vijaya Bank, Alkapuri Branch, after obtaining Title Clearance Certificate, will also lose

its significance. He submitted that the Bank has nothing personal against the petitioners, but then, the Bank is duty bound to realise its loan amount by enforcing its rights against the property, which is the 'secured assets.'

13. The respondent No.3 is represented by an advocate, who in categorical terms has stated before this Court that the respondent No.1 – Bank may enforce its right in accordance with law. The respondent Nos. 4 and 5, though served, have chosen to abstain from hearing. The only inference which can be drawn is that they do not have any thing to say in this case.

14. In view of the aforesaid discussion, this Court finds no substance in the petition. Hence, the petition is dismissed. Status-quo, granted earlier, stands vacated forthwith. Notice is discharged with no order as to costs.

15. At this juncture, Mr. Majmudar, learned advocate for the petitioners requests that the status-quo

granted by this Court on 1st August, 2005 be continued for some time.

Having found no substance in the matter, the request of the learned advocate for the petitioners cannot be accepted. Hence, it is rejected.

Copy of this order be made available to the learned advocate Mr. P.G.Desai appearing for the respondent No.1 – Bank of Baroda to take an appropriate actions in the matter.

(RAVI R. TRIPATHI, J.)

kdc.